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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BOBBY JOHNNIE MCCLOUD,

Defendant and Appellant.

E071343

(Super.Ct.No. RIF1301585)

OPINION

APPEAL from the Superior Court of Riverside County. Samuel Diaz, Jr., Judge.

Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

Following our decision in *People v. McCloud* (2017) 15 Cal.App.5th 948 (*McCloud I*) reversing Bobby Johnnie McCloud’s conviction for transportation for sale, the trial court resentenced him for the remaining felony drug offense and related misdemeanors. The court imposed a life sentence (26 years to life) under the “Three Strikes” law (Pen. Code,¹ §§ 667, subds. (c), (e)(2)(A) & 1170.12, subd. (c)(2)(A)), based on its finding that McCloud had four prior serious and violent felony convictions—a robbery (§ 211) from 1990 and three assaults of an officer with a machine gun (§ 245, subd. (d)(3)) from 1994.² The three assault convictions arose from a 27-minute police pursuit during which McCloud fired multiple rounds of shots at an officer from the window of a moving car.

In this appeal, McCloud argues the trial court erred in denying his motion to treat the prior assault convictions as a single strike under *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*), which held that multiple convictions “arising out of a single act against a single victim” count as only one strike. (*Id.* at p. 637.) We conclude the trial court properly determined *Vargas* does not apply because the assaults were based on three separate criminal acts.

¹ Unlabeled statutory citations refer to the Penal Code.

² McCloud’s 26-years-to-life sentence is composed of an indeterminate term of 25 years for the new principal count, plus a one-year prison prior enhancement. (§§ 667, subd. (e)(2)(A) & 667.5, subd. (b).)

But McCloud’s appeal lacks merit for a more fundamental reason. Even if the trial court *had* treated his three assaults as one strike, such relief would have no effect on his sentence. This is because he would still have two serious or violent felony convictions on his record—the robbery and the assault—and the Three Strikes law mandates an indeterminate sentence for a current felony when one of two serious or violent felonies is assault of an officer with a machine gun. (§§ 667, subd. (e)(2)(C)(iv)(VI) & 1170.12, subd. (c)(2)(C)(iv)(VI).) We therefore affirm.

I

FACTS

A. *McCloud I*

In November 2015, a jury convicted McCloud of possession for sale (Health & Saf. Code, § 11351) and transportation for sale (Health & Saf. Code, § 11352, subd. (a)), plus two misdemeanors (being a felon in possession of a stun gun and resisting an officer). In a separate bench trial, the court found McCloud had a prison prior, a prior strike conviction from 1990 for robbery, and three prior strike convictions from 1994 for assaulting an officer with a machine gun. (*McCloud I*, *supra*, 15 Cal.App.5th at p. 950.) The court denied McCloud’s motions to strike one of his prior convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and to treat his three super

strikes as a single strike under *Vargas*, and sentenced him to a total of 28 years and eight months to life.³

In September 2017, after McCloud filed an appeal challenging various aspects of his case (but not the court’s denial of his *Romero* and *Vargas* motions), we issued an opinion reversing the transportation for sale conviction because the jury instruction for that offense omitted an essential element and the evidence supporting the missing element was not overwhelming. (*McCloud I, supra*, 15 Cal.App.5th at p. 950.) We remanded the case for resentencing, noting the People could elect to retry McCloud for transportation for sale.

B. *Resentencing and the Vargas Motion*

The People decided not to retry McCloud on the transportation for sale count, and the trial court held McCloud’s resentencing hearing on September 14, 2018. McCloud renewed his *Vargas* motion regarding the three 1994 assaults, arguing they should constitute a single strike because they occurred during an “indivisible course of conduct.” The People opposed the motion and attached police reports describing the incident.

One of the reports was written by the officer victim. He said he had been on patrol the evening of March 23, 1994, when a Cadillac with a shirt covering the license plate

³ The court deemed transportation for sale the principal count and imposed an enhanced sentence of 25 years to life under the Three Strikes law, based on McCloud’s prior strikes (§ 1170.12, subd. (c)(2)(A)), plus a two-year enhancement for committing the offense while out on bail on the possession for sale charge (§ 12022.1). The court also imposed an eight-month sentence for the possession for sale count, plus a one-year prison prior enhancement. (§ 667.5, subd. (b).)

drove past him. Suspecting the occupants had (or were about to) commit a crime, the officer attempted to stop the car, but it sped away. The officer followed the car and activated the patrol lights, and it quickly became apparent he was involved in a high speed pursuit. As the Cadillac sped through Claremont, the front passenger—later identified as McCloud—leaned out the window and “fired a burst of rounds” at the officer. The officer swerved to avoid the blasts, and not long afterwards McCloud fired again, in a “rapid burst of 3-4 rounds at a time.” After firing another two volleys of shots, McCloud “began to lean down inside the vehicle as if to reload the weapon.” Sometime later, McCloud reappeared out the window and released another volley of shots. The chase ended in Colton, when the officer collided with the Cadillac as it was attempting to take an onramp for the 10 freeway. All told, the pursuit lasted 27 minutes and spanned 33 miles. The officer estimated McCloud had fired at him on seven separate occasions “and each time there was 3-4 rounds fired.”

The People also submitted a report written by one of the arresting officers, who interviewed the person who had been sitting in the backseat of the Cadillac, behind McCloud. That person said McCloud had already fired “several rounds” at the officer when the gun jammed. McCloud handed the gun to another passenger, who fixed the jam, tested the gun, and gave it back to McCloud, at which point he began firing at the officer again.

Before ruling on the motion, the court noted it had reviewed the briefs, police reports, probation report, and the previous *Vargas* motion and opposition from the

sentencing hearing in *McCloud I*. The court concluded *Vargas* did not apply and the three assaults constituted three separate strikes because the firing was not one single, continuous act. It found there was “some time” between each volley of shots McCloud had fired, enough for him “to reflect” on his actions. The court also found it significant that the judge who had sentenced McCloud for the assaults had imposed consecutive, rather than concurrent, sentences on each count and had refused to stay any of those sentences under section 654. “[The prior sentencing judge] was the judge that was more—he was in the best position to know the facts, and he . . . found there was no 654 . . . [a]nd that’s very important for this sentencing judge.”

The court dismissed the transportation for sale count, deemed possession for sale the principal count, and sentenced McCloud to a total of 26 years to life.

II

ANALYSIS

A trial court may dismiss a prior strike conviction under section 1385 “in furtherance of justice.” (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529-530.) If the court decides to dismiss a prior strike, “it must set forth its reasons in an order entered on the minutes.” (*People v. Williams* (1998) 17 Cal.4th 148, 161.) “While a court must explain its reasons for striking a prior . . . , no similar requirement applies when a court declines to strike a prior [citation]. ‘The absence of such a requirement merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law.’ [Citations.] ‘Thus, the three strikes law not only

establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.'” (*In re Large* (2007) 41 Cal.4th 538, 550.) We review the denial of a motion to dismiss a strike for abuse of discretion. (*Williams*, at p. 162.)

McCloud argues the trial court abused its discretion in denying his *Vargas* motion because the assaults involved the same incident, victim, and offense. As such, he argues, the crimes were so “closely connected” they constitute a single strike under *Vargas*.

McCloud misapprehends the holding of *Vargas*. The test that case articulated for determining when multiple strike convictions must be counted as a single strike under the Three Strikes law is not whether the underlying offenses are closely connected, but rather whether they arise from “a *single act* against a single victim.” (*Vargas, supra*, 59 Cal.4th at p. 637, italics added.) In contrast, strike convictions arising from “*multiple acts* committed in an individual course of conduct,” count as separate strikes. (*Id.* at p. 643, some italics omitted.)

In *Vargas*, the defendant had two prior strikes—carjacking and robbery—which arose from her single act of forcibly taking the victim's car. (*Vargas, supra*, 59 Cal.4th at p. 638.) When she was later convicted of another felony, the trial court treated the carjacking and robbery convictions as two separate strikes and sentenced her to 25 years to life under the Three Strikes law. (*Vargas*, at p. 638.) The California Supreme Court

reversed the sentence. It held that when a defendant commits a “single criminal act” on a single victim that results in two felony convictions under two different statutes, a trial court abuses its sentencing discretion if it fails to strike one of the two convictions for purposes of the Three Strikes law. (*Vargas*, at pp. 640-649.) In other words, “two prior convictions arising out of a single act against a single victim” count as only one strike under the Three Strikes law. (*Vargas*, at p. 637.) In reaching this decision, the Court reasoned that when a person commits but a single act, they do not pose a greater risk to society merely because the Legislature has chosen to criminalize the act in different ways. (*Id.* at p. 646.)

The Court distinguished this “extraordinary” circumstance from the more common situation where a defendant commits “multiple criminal acts . . . in a single course of conduct.” (*Vargas, supra*, 59 Cal.4th at p. 648.) Such was the situation in *People v. Benson* (1998) 18 Cal.4th 24, where the defendant’s two prior strike convictions arose from a single incident during which he entered a neighbor’s apartment to retrieve his keys, grabbed his neighbor, forced her to the floor, and repeatedly stabbed her. (*Id.* at p. 27.) The defendant was convicted of residential burglary and assault with intent to commit murder, but the trial court stayed one of the convictions under section 654, because both offenses were based on the same course of conduct. (*Benson*, at p. 28.) On appeal, the defendant argued that section 654’s application to his prior convictions mandated that they be treated as one strike under the Three Strikes law. (*Benson*, at p. 28.) The Court disagreed, concluding that a stay under section 654 did not prohibit the

imposition of multiple strikes, because the convictions were based on “multiple acts.” (*Benson*, at pp. 28-31, 36, fn. 8.)

McCloud is wrong that his case is more like *Vargas* than *Benson*. Unlike in *Vargas*, where the defendant committed a single act that violated two different Penal Code provisions, McCloud’s assault convictions arose from three separate shootings that took place minutes apart from each other. That we do not know *how many* minutes elapsed between each shooting does not matter. The dispositive fact is that McCloud’s convictions are not based on a single act, rather each arose from a distinct volley of machine gun blasts.

More importantly, however, even if McCloud *were* correct and *Vargas* did apply to his assaults, the Three Strikes law would still mandate he receive an indeterminate sentence of 25 years. If the trial court had granted the *Vargas* motion, McCloud would still have two serious or violent felonies on his record—robbery and assault of an officer with a machine gun. The Three Strikes law requires an indeterminate 25-year sentence where a defendant is convicted of a serious felony (as defined in § 667, subd. (d)) and “has two or more prior serious or violent felony convictions.” (§ 667, subd. (e)(2)(A).) Where, as here, a defendant “has two or more prior serious or violent felony convictions” but the current felony conviction is not a serious felony, the Three Strikes law allows for more lenient sentencing *unless* one of those serious or violent felonies is an “[a]ssault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.” (§ 1170.12, subd. (c)(2)(C)(iv)(VI).) In such cases, the

Three Strikes law mandates an indeterminate 25-year sentence. Thus, in McCloud’s case, even a *single* conviction for assault of an officer with a machine gun would be enough, coupled with the robbery, to subject him to an indeterminate 25-year sentence for his current felony, despite the fact the felony is not considered serious under the Three Strikes law. We therefore reject McCloud’s claim of sentencing error.

III

DISPOSITION

We affirm the judgment of conviction.

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SLOUGH
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.